27. Against this background, USSB's extended quotations from the Honorable Chairman Dingell regarding the benefits of exclusive arrangements are badly misplaced. (USSB, p. 26). Chairman Dingell was speaking in favor of the Manton Amendment and in opposition to the Tauzin Amendment. He expressed support for the concept of exclusivity, because he knew the Tauzin Amendment would break these types of exclusive agreements and open the entire cable programming industry to competition.15/

28. It is absolutely clear from the above-referenced debate that there was no doubt in the minds of either the proponents or the opponents of the Tauzin Amendment concerning its intent and what it would accomplish if enacted: it would break exclusive arrangements in the cable industry and open access to programming for all distributors.

29. USSB claims that "(n)othing in the legislative history suggests that Congress intended to prevent DBS and other multichannel video programming distributors from entering into exclusive contracts." (USSB, p. 15, n. 10). USSB's focus on DBS distributors, however, misses the point entirely. Congress prohibited vertically integrated cable programmers (not multichannel video

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15/ Chairman Dingell was concerned that "(t)he Tauzin Amendment ... will make the artists who now create these programs less willing to enter the video marketplace by removing their ability to control who exhibits their creative works." See, 138 CONG. REC. 6542 (daily ed. July 23, 1992).

programming distributors) from entering into arrangements that prevent other distributors from obtaining programming in areas unserved by cable. 47 USC Section 548(c)(2)(C). The purpose of the statute was to break the cable industry's stranglehold over programming, not to govern the conduct of non-cable distributors. NRTC's objection to the USSB/Time Warner/Viacom deal is focused on Time Warner's and Viacom's grant of exclusivity, no USSB's receipt of it per se.

3. Exclusive Arrangements in Unserved Areas Thwart the Program Access Policies of the Cable Act.

30. The express purpose of Section 628 of the Cable Act is to increase competition, diversity and the availability of programming to persons in rural and other areas. 47 U.S.C. § 548(a). Activities by vertically integrated cable programmers could thwart this Congressional purpose as easily as activities by cable operators themselves. Either way, the vertically integrated cable industry could threaten the development of new technologies and the provision of a diversity of programming services to the public. By enacting the broad language of Sections 628(b) and 628(c)(2)(C), Congress barred any such conduct that prevents distributors from obtaining programming in areas unserved by cable.

31. USSB does not explain why the Commission should re-write the statute to prohibit only exclusive arrangements involving cable operators. USSB

has presented no explanation, for instance, why cable operators should be prohibited from entering into exclusive arrangements that block the distribution of programming to competing technologies, but vertically integrated cable programmers (such as Time Warner and Viacom) should be permitted to do so.

32. Time Warner and Viacom are cable operators. They own and control cable systems, which is what makes them vertically integrated cable programmers in the first place. If cable operators are prohibited from entering into exclusive arrangements, then certainly vertically integrated cable programmers should be prohibited from doing so, as well.16/

33. This approach not only follows the clear language of the statute, it is consistent with Section 628(c)(2)(B), which prohibits discrimination "among or between" multichannel video programming distributors by both cable operators and vertically integrated cable programmers. Although Congress exempted from this nondiscrimination requirement certain exclusive contracts governing the distribution of programming to areas served by cable [47 U.S.C. § 548(c)(2)(B)(iv)], no such exemption was provided for exclusive arrangements governing the distribution of programming to areas unserved by cable. Why?

16/ USSB itself apparently is not entirely free from the influence of the cable industry. Viacom International has joined with Conus Communications, Inc. ("Conus") to create and distribute the ALL NEWS CHANNEL, a 24 hour news service. Conus and USSB share certain ownership interests.

Because all exclusive arrangements in unserved areas are already prohibited per se by Section 628(c)(2)(C). Congress, therefore, recognized that the ultimate form of discrimination -- an exclusive arrangement whereby a programmer or operator flatly refuses to deal with a distributor -- is not permissible under any circumstances in areas unserved by cable.

34. According to USSB, however, the Commission should be unconcerned about the ramifications of USSB's exclusive arrangement with vertically integrated cable programmers. After all, according to USSB, USSB only obtained exclusivity "against its direct competitors..." (e.g., DirecTv and NRTC) (USSB, p. 14). "USSB's contracts do not deprive the consumer of service, because USSB will be providing service ... " (USSB, p. 14). Consumers, according to USSB, "will not care whether HBO is received via DirecTv or a USSB transponder." (USSB, p. 16).

35. In other words, according to USSB, the promotion of competition through a variety of program distributors should not be a concern of the Commission's. A diversity of video programming sources is unimportant. A plethora of voices is unnecessary. The Commission need not worry about these competitive issues, because all consumers will be served fairly and faithfully by USSB.

36. Under USSB's approach, any vertically integrated cable programmer could enter into an exclusive arrangement with one favored multichannel video programming distributor per technology: one C-band distributor, one MMDS distributor, one SMATV distributor, one DBS distributor (i.e., USSB), etc. Under USSB's theory of Program Access, one programming distributor for each distribution technology could obtain exclusivity from a vertically integrated programmer -- and, like USSB, block competition from other distributors using that distribution technology. To receive the same menu of programming routinely available to consumers served by cable operators, rural consumers unserved by cable would be required to purchase a multitude of separate packages of programming through USSB and other distributors blessed with exclusivity by the various cable programmers.

37. There is no indication in the Cable Act that Congress would be satisfied with access to programming for only one distributor per technology, as USSB claims. One-distributor-per-technology is not "competition" in the video programming marketplace, and it is not what Congress envisioned in adopting stringent Program Access requirements. Congress intended to and did create a

level playing field, so that all distributors, not just USSB, could have full and fair access to cable programming.

III. Conclusion

In adopting the Cable Act, Congress mandated Program Access, not one-distributor-per-technology as envisioned by USSB. Vertically integrated programmers such as Time Warner and Viacom may not lawfully enter into exclusive arrangements that prevent distributors from obtaining programming for distribution to persons in areas not served by a cable operator. USSB has no statutory right to block competition from its "direct competitors." Congress intended just the opposite result. Congress mandated fair access to programming on a technology neutral basis.

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Commission to act in accordance with

the views expressed herein and to rule favorably upon NRTC's pending Petition for Reconsideration in this proceeding.

Respectfully submitted,

NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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Attachment

Dated: March 4, 1994

Attachment A

BILLY TAUZIN
THIRD DISTRICT, LOUISIANA

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June 16, 1993

The Honorable John Sprizzo
United States District Court
Southern District of New York
U.S. Courthouse
Foley Square, Room 612
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RE: Civil Action No. 93-CIV-____, The States of New York, California, Maryland, et. al. v. Primestar Partners and Civil Action No. 93-CIV-3913, U.S. v. Primestar Partners

Dear Judge Sprizzo:

I am writing you today to express my reservations about the antitrust consent decrees filed by the States' Attorneys General and the U.S. Department of Justice in the Primestar Partners matter. I am concerned with the effect these consent decrees may have on the development of full competition to the cable industry, particularly the impact these decrees will have on the direct broadcast satellite industry (DBS), potentially the most viable competitor to cable.

Last year, the Congress enacted the Cable Television Consumer Protection and Competition Act of 1992. I was the author of the program access amendment to the Act which was adopted on the floor of the U.S. House of Representatives. Section 19 of the Act, the program access provisions, was vigorously debated by the Congress and ultimately emerged as the premier competitive aspect of the Act. Section 19 contained a flat prohibition against discriminatory pricing and prohibited exclusive contracts except in the most limited circumstances and only after the Federal Communications Commission makes a finding that such a contract is in the public interest. It is my understanding that the consent decrees as filed by the States' Attorneys General and the Justice Department undermine both the letter and spirit of the 1992 Cable Act.

In particular, the consent decree filed by the States' Attorneys General permits Primestar Partners to enter into an exclusive contract with a high-power DBS operator at the 101 degree orbital position effectively permitting the Primestar Partners to prevent any other DBS operator at that orbital position from obtaining the programming controlled by Primestar and its partners. This is also true for all other orbital slots. In addition, this subparagraph appears to create not only a ceiling, but a floor for "price, terms, and conditions" by

establishing the presumption that an agreement reached with the first high-power DBS provider operating from the 101 degree orbital position is not discriminatory. This pricing provision creates the potential for artificially high pricing, thereby undercutting the benefits to consumers which should flow from increased competition to cable.

I would appreciate time to review these decrees more thoroughly before a final judgment is entered. Therefore, I request that the Court allow interested parties to comment on the agreement reached by both the States' Attorneys General and the Justice Department.

Your consideration in this matter is appreciated.

Sincerely,

Billy Tauzin

BILLY TAUZIN
Member of Congress

BT/dt